IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	**)**	
	)	
Respondent,	**)**	
	)	
vs.	**)**	**No. SC 87749**
	)	
PAUL L. BAINTER,	**)**	
	)	
Appellant.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE LUCY D. RAUCH, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Paul Bainter, incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full.

STATEMENT OF FACTS

Mr. Bainter incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

ARGUMENT

I.

The State has pointed to no evidence in its brief that would tend to establish that the McDonald's Bar and IGA robberies were signature crimes, which is required to admit such evidence under the identity exception to the prohibition against admitting evidence of other crimes. Mere similarities—either between the two crimes or between Davis and Mr. Bainter and either set of robbers—do not suffice to establish the unique signature required for admission of such evidence.

The theme of the State's argument is "sufficiently similar." It claims that the McDonald's Bar and IGA robberies were "sufficiently similar" because both sets of robbers used the name "Ed," the IGA robbers had "many similarities" to Davis and Mr. Bainter, and "the circumstances of the robberies" were similar. (Resp.Br. 24).

But those factors do not add up to the "signature/*modus operandi*" necessary to allow admission of highly prejudicial other-crimes evidence under the identity exception. Further, the alleged "similarity" of Davis and Mr. Bainter to the IGA robbers is evidence that stands or falls on its own; it is not a factor in admitting the McDonald's Bar evidence. More importantly, "sufficiently similar" is not the test for admissibility.

To prove identity, other crimes evidence must qualify under the signature modus operandi exception by fulfilling two components:

> similarity and uniqueness. Edward J. Imwinkelried, Uncharged Misconduct Evidence, § 3.10 (1992-94); *see* [***State v.***] ***Bernard***, 849 S.W.2d [10 (Mo. banc 1993)] at 17. First, the other crime and the crime charged must bear striking similarity in the type and methodology of crimes committed, in the time span between the crimes, and in the geographic distance separating the two crimes. Imwinkelried, *supra*, § 3.11. Yet a series of identical crimes committed close in time and in proximity cannot alone fulfill the signature modus operandi exception. *Id.*, § 3.12; *see* ***Bernard***, 849 S.W.2d at 17. In addition to striking similarity, the other crime and the crime charged must share a unique methodology identifying the defendant as the perpetrator. Imwinkelried, *supra*, § 3.12. That methodology must be so unique and distinctive as to become a signature to the defendant's involvement in both crimes. ***Bernard***, 849 S.W.2d at 17.

State v. Anthony, 881 S.W.2d 658, 660 (Mo.App. W.D. 1994). The State has offered nothing to show that the McDonald's Bar evidence meets this test.

Indeed, the State's argument erroneously focuses on factors that it claims prove that Davis and Mr. Bainter committed <u>both</u> robberies; the proper focus is on whether there is any evidence that the two robberies were committed by the same two men—similarity and uniqueness. *Id*. The following are the similarities between the <u>robberies</u>, themselves—as opposed to similarities between the IGA robbers and Davis and Mr. Bainter—claimed by the State:

- The larger bar robber referred to the smaller as “Ed,” while the smaller IGA robber referred to the larger as “Paul,” then said “Ed” several times. (Resp.Br. 34);
- The guns used in both robberies were similar. (Resp.Br. 35);
- Both sets of robbers wore dark ski masks and black gloves. (Resp.Br. 35).
- The IGA robbers were stocky, as were Davis and Mr. Bainter; Mr. Bainter weighed 300 pounds (Resp.Br. 35);
- Both robberies occurred shortly before closing time, were close in time, and were five miles apart (Resp.Br. 35);
- The robbers of both establishments took cash and coins. (Resp.Br. 36);

The other evidence mentioned by the State does not link the two robberies but is simply an argument that there was some evidence, weak though it was, tending to show that Davis and Mr. Bainter may have robbed the IGA. This includes the facts that one IGA robber was taller than the other and Mr. Bainter was taller than Mr. Davis (Resp.Br. 35); and that coins seized when Davis and Mr. Bainter were arrested were in wrappers similar to those taken from IGA (Resp.Br. 36).

Again, nothing in the State’s recitation on appeal or in its evidence at trial demonstrates “similarity and uniqueness,” nothing shows “striking similarity in the type and methodology of crimes committed,” and nothing shows “methodology . . . so unique and distinctive as to become a signature to the defendant’s involvement in both crimes.” ***Anthony***. All it mentions are “similar weapons, similar time of occurrence, similar clothing and/or ski masks, and similar property taken.” (Resp.Br.

37). This is an exaggeration of the facts, and even as such it does not qualify as unique or a signature.

The weapons at the IGA were black revolvers, one larger than the other (Tr. 343-44). But one witness to the bar robbery said the guns looked the same, while the other witness said the shorter man had a large gun, and he did not describe the other man's gun (Tr. 752, 780, 810). In fact, in a pretrial hearing, the prosecutor said the second gun was *not* the same: a nine millimeter was used at the bar (Hr.Tr. 8-19-04, 68-69). Thus it is not correct to say that there were "similar weapons." Further, there was indeed a unique identifier on one of the guns at the IGA—two of the seven IGA witnesses saw orange paint on the tip of the larger gun (Tr. 343, 483), yet this was not mentioned by any bar witness. The weapons were <u>not</u> "similar."

The time of day was also not similar. The IGA was robbed at 8:20 p.m., forty minutes before closing (Tr. 379), while the bar was already getting ready to close at 1:10 a.m. when it was robbed (Tr. 746).

As for the State's claim of similarity in clothing, this is also an inaccurate assertion. One bar robber wore either a camouflage jacket and dark pants (Tr. 748, 801-02), or camouflage pants (Tr. 810), and the other wore a light colored fleece jacket (Tr. 748, 801-02, 810). On the other hand, one of the IGA robbers wore dark clothing (Tr. 400, 423), while the other wore either blue jeans or light blue sweatpants, and a denim jacket (Tr. 372, 480-81). The only similarity was dark ski masks and gloves, which is hardly unique, let alone a signature.

Finally, the State says there was similar property taken. Yes, amazingly enough, both sets of robbers took all the cash and coins they could locate. How this qualifies as a "unique" circumstance of either robbery is unstated. Perhaps if the men had passed up certain items of cash, an argument could be made. Or if they took cases of beer along with the cash from both bar and grocery, the State may have something to discuss. Or even if the IGA robbers had taken money from individual workers and customers, it might have been a bit similar to the bar robbery, where the men took money from the bartender. But none of this happened, and taking all the money is not a signature crime.

Interestingly, the State does not discuss the significant differences between the two crimes. While it points out that one bar robber and one of the men seen earlier that evening at Citgo had "distinctive southern, or country" accents (Resp.Br. 33-34),[1] not one of the seven witnesses from IGA described such an accent. It does not mention that both IGA robbers told the people they would not be hurt (Tr. 344, 474-75). In fact, one robber told a crying teenage employee, "I'm not going to shoot you, all I want is the money" (Tr. 475), but at the bar, only one man spoke, harshly,

[1] Although the State refers to this as a "distinctive" accent, the Citgo clerk actually said "he had, not a strong southern accent, but there was a little southern in his voice." (Tr. 726). The McDonald's bartender said of one man, "I don't want to say he was from the south, but he seemed like he had some sort of accent like from living out in the country maybe, distinctive." (Tr. 775).

threatening to shoot one customer if anyone moved (Tr. 810-11). Finally, the State does not mention that only one bar robber was involved in collecting money and the other stayed by the door (Tr. 750-55, 810), while at IGA one man got the money from the front office (Tr. 345-46), and the other collected money from at least one cash register (Tr. 471).

Also interestingly, the State nowhere admits that in the trial court it specifically denied that the "signature/*modus operandi*" exception applied (Hr.Tr. 8-19-04, 69). And it has not argued on appeal that the evidence fits that exception. The reason is clear: it does not fall under that exception, and it was therefore not admissible.

All the State's repetition about similarities between Davis and Mr. Bainter on the one hand, and either the McDonald's Bar robbers or the IGA robbers on the other, does not advance this inquiry one iota toward being able to conclude that the crimes were so unique as to constitute a signature.

The State posits that this case is like three others: ***State v. Young***, 661 S.W.2d 637 (Mo.App. E.D. 1983), ***State v. McDaniels***, 668 S.W.2d 230 (Mo.App. E.D. 1984), and ***State v. Thurman***, 887 S.W.2d 403 (Mo.App. W.D. 1994). (Resp.Br. 37). But after discussing the facts of each case (Resp.Br. 37-39), the State offers no explanation how this case is like any of the three.

First of all, ***Young*** and ***McDaniels*** both predate ***Bernard*** and their continued viability is therefore suspect. Even so, both cases require more than what is present here. In ***Young***, all three alleged victims accepted rides from the defendant on the premise that he would take them home; he drove all three to secluded parking lots and

parked so close to another vehicle that the victims were unable to escape; and he threatened all three in a similar manner. 661 S.W.2d at 640. The Court of Appeals found Young's "methodology in the three attacks sufficiently unusual and distinctive so as to allow the introduction of evidence of the crimes as defendant's 'handiwork,' thereby establishing defendant as the perpetrator. *Id*.

The ***McDaniels*** court relied on ***Young*** to allow evidence of an earlier alleged attack by the defendant: both attacks occurred in the same general vicinity; neither victim had any prior acquaintanceship with her attacker; each attacker grabbed his victim and exhibited a knife; and each completely disrobed the victim before engaging in both anal sodomy and intercourse. "Most significantly, in each case defendant used vasoline [sic] when sodomizing his victim." 668 S.W.2d at 233. Again, the distinctive methodology arguably made this the defendant's signature.

And in ***Thurman***, the only case of the three to follow and cite ***Bernard***, the defendant *confessed* to shooting another victim three weeks after the incident on appeal, and ballistics evidence established that the *same* gun was used in both cases. 887 S.W.2d at 409. The use of what was scientifically proven to be the *same*, not a "similar," gun, arguably qualifies as a signature, and makes ***Thurman*** very different from the instant case.

As noted, after discussing each of these cases, the State simply says "[i]n this case, the two robberies were sufficiently similar in time, place, and method, which tended to prove that both robberies were the handiwork of [Mr. Bainter] and Davis."

(Resp.Br. 39). But as shown above, that conclusion is not based on any evidence to which the State can point in this case.

Mr. Bainter finally addresses the State's claim that many bills seized when Davis and Mr. Bainter were arrested had "staple-like" holes in them, and there was testimony that McDonald's Bar uses staples to separate out bills used by a customer to pay on account and distinguish that money from payments for sales that day. (Resp.Br. 36; Tr. 766-67, 943-44, 977-78). While this evidence has nothing to do with whether or not these robberies were signature crimes, the State nonetheless argues that the fact of the staple holes creates a reasonable inference that that money came from the bar. (Resp.Br. 36).

What the State fails to point out is that the evidence was that the stapled money taken from the bar was a $20, a $10, a $5, and three $1s (Tr. 767). But the police identified at least three $10s, a $20, and a $5 that had staple holes (Tr. 943-44, 977-78). Therefore, staple holes in currency are apparently not unusual, and here are not a unique identifier.

Mere "similarities" are not sufficient on which to try Mr. Bainter for two unrelated crimes. The State did not prove that the two robberies were the signature of Davis, Mr. Bainter, or anyone else, and it did not meet the test for admitting the bar evidence under the identity exception to other-crimes evidence as required by ***Bernard*** and its progeny. For these reasons, as well as those stated in his opening brief, Mr. Bainter asks this Court to reverse his convictions and remand for a new trial without admission of the evidence concerning the robbery of McDonald's Bar.

II.

The State has provided no reason for this Court to ignore longstanding Missouri precedent that the compete failure to swear the jury to try the case renders the verdict a nullity, on which the trial court could not enter sentence and judgment.

Mr. Bainter must agree at the outset that the State is correct, as it was in the Court of Appeals, in pointing out that Mr. Bainter's claim is not based on a lack of jurisdiction. (Resp.Br. 41). Mr. Bainter noted in his reply brief in the Court of Appeals that he withdrew the claim of a lack of jurisdiction. But, unfortunately, undersigned counsel copied the same Point Relied On into the substitute brief herein. This claim is not based on a lack of subject matter jurisdiction over the class of case; rather, the claim is that the trial court could not enter sentence and judgment because it did not have a valid verdict returned by a properly sworn jury.

On that issue, although the State argues for a new rule—that failure to object before the verdict is returned should operate as a waiver (Resp.Br. 46)—it has given this Court no reason to change its century-long rule that if the jury is never sworn to "well and truly" try the case and render a true verdict according to the law and the evidence, there is not a legitimate verdict. ***State v. Mitchell***, 199 Mo. 105, 97 S.W. 561, 562 (1906).

The State claims that the new rule it proposes would be in line with the approach taken in other jurisdictions, citing ***Sides v. State***, 693 N.E.2d 1310 (Ind.

1998), ***State v. Arellano***, 965 P.2d 293 (N.M. 1998), and ***State v. Vogh***, 41 P.3d 421 (Or.App. 2002). (Resp.Br. 46). These cases do not support the State's position.

In ***Sides***, the record did not indicate whether the jury was sworn to try the case, but the Court noted that various instructions told the jurors, 1) "You have been selected as juror and have taken an oath to well and truly try this case[;]" 2) "When you were sworn to try this cause, you became a part of this Court and entrusted with the enforcement of the law and the administration of justice[;]" and 3) "this cause is submitted to you with confidence that you will faithfully discharge your sworn duty as jurors." *Id*., at 1312, n.6. The Court said, "[t]hese three instructions, and others, surely conveyed to the jury that they were bound by their oaths to deliberate honestly." *Id*. Thus the jury was <u>essentially</u> sworn to try the case and this is very different from Mr. Bainter's case, where the jury was sworn only to answer questions truthfully during voir dire.

Arellano is also distinguishable. In that case, the Court noted that the venire members were asked during voir dire whether they understood that the purpose of jury selection was to find impartial persons to try the case, and that a juror's duty was to determine facts of the case only from the evidence presented in court, and deliver a verdict free from prejudice. 965 P.2d at 294. That alone distinguishes the case. But further, defense counsel admitted that he was aware that the jury had not been sworn and that he had researched the issue and concluded that the verdict could be nullified; thus he deliberately made a tactical decision not to call the court's attention to the omission until after the jury rendered its verdict and was finally discharged. *Id*.

It would have been reasonable in ***Arellano*** to affirm the conviction because of a deliberate and knowing waiver. But further, the trial court recalled the jurors, administered the oath and questioned them, and "each juror assured the court that he or she had followed the oath during the trial and deliberations; [and] each stood by the verdict." *Id*. The case is thus more like ***State v. Frazier***, 339 Mo. 966, 98 S.W.2d 707, 715 (1936) (if the record shows that jury was sworn before beginning deliberations, the failure to timely swear may be waived). The court took no such action here.

Vogh comes closest of the three to being on point. Though it disagreed, ***Vogh*** recognized that ***Mitchell*** "authoritatively" held that "a verdict by an unsworn jury is a nullity[.]" 41 P.3d 425-26. In declining to adopt that holding, ***Vogh*** relied in great part on an earlier Oregon case, ***Griffin v. Pitman***, 8 Or. 342, 344 (1880), in which the Oregon Supreme Court held that, when a court fails to swear the jury and "either party, being present and aware of that fact, remains silent and takes the chances of a verdict in his favor, he will not be permitted to question the validity of it, if the verdict should prove unfavorable." ***Vogh***, 41 P.3d at 426. Arguably, therefore, ***Vogh*** merely applied existing Oregon law.

Courts in other cases have continued to apply the rule as it exists in Missouri, despite the State's attempt to classify ***Vogh*** as the more modern approach. The State itself notes two such cases, ***Keller v. State***, 583 S.E.2d 591, 593 (Ga.App. 2003) ("A criminal defendant may not waive the trial court's complete failure to administer an oath to the jury. [A] conviction by an unsworn jury is a mere nullity." (footnotes and

citations omitted)), and ***State v. Godfrey***, 666 P.2d 1080, 1082 (Az.App. 1983) (where the jury was sworn five minutes after it began deliberations, the failure to swear the jury was not reversible error, but, "if the oath were not given at all we would have no hesitation in finding reversible error even absent any showing of actual prejudice.").

The rule in Texas is similar to that of ***Mitchell*** and ***Frazier***:

> It has been held that the complete failure to administer the proper jury oath is a reversible error that may be raised for the first time on appeal. ***Howard v. State***, 192 S.W. 770 (Tex.Cr.App. 1917). But the rule is not the same if the proper oath was given, but merely given untimely. *Id*.

White v. State, 629 S.W.2d 701, 704 (Tex.Cr.App. 1981) (rule also noted in ***Maxwell v. State***, 2004 WL 3094649 (Tex.Cr.App. 2004) (unpublished).

The Wisconsin Court of Appeals agreed with the approach of ***Frazier*** in modifying ***Mitchell***: "where the jury is sworn during the trial, but prior to the commencement or [sic] deliberations upon the verdict, the error does not warrant reversal in the absence of prejudice." ***State v. Block***, 489 N.W.2d 715, 717 (Wis.App. 1992), citing, ***State v. Apodaca***, 735 P.2d 1156, 1160 (N.M. App. 1987), *overruled on other grounds*, ***State v. Garcia***, 796 P.2d 1115 (N.M. App. 1990).[2] In Wisconsin, too,

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[2] ***Apodaca*** was distinguished in ***Arellano***, *supra*, but ***Arellano*** did not disapprove ***Apodaca's*** recognition of the general rule that "a complete failure to swear the jury cannot be waived and a conviction by an unsworn jury is generally held to be a nullity." ***Arellano***, 965 P.2d at 295.

therefore, at least by implication, the complete failure to swear the jury, as here, requires no showing of prejudice.

Thus there is authority from other states to show that Missouri's rule is not the antiquated relic the State asserts. Further, the State does not acknowledge or attempt to refute Mr. Bainter's argument in his opening brief that more recent Missouri cases support the continued validity of ***Mitchell***: ***State v. Shaw***, 636 S.W.2d 667, 671 (Mo. banc 1982) (no error in trial court's failure to read "recess instruction" to venire panel at first recess because, "[t]he jury does not exist until the veniremen selected therefor are sworn to service in that capacity"); ***State v. Bohlen***, 690 S.W.2d 174, 177 (Mo.App. E.D. 1985) (because jury did not yet exist, no error in trial court's failure to sequester venire panel after jury selected, but not sworn; citing ***Shaw***).

The State claims that Mr. Bainter cited no cases in support of his argument that the complete failure to swear the jury constitutes structural error. (Resp.Br. 50). To the contrary, that was the entire point of ***Mitchell***:

> It is essential to the legality of any criminal trial that there should be a lawfully constituted tribunal, and where such tribunal is composed in part of a jury to whom the statute, in the plainest and most unmistakable terms, declares a given oath must be administered, how can the tribunal be considered as lawfully constituted unless the jurors actually take the oath literally or in substance?

97 S.W. at 562, *quoting*, ***Slaughter v. State***, 28 S.E. 159 (Ga. 1897). The Court concluded, "the record proper in a criminal appeal must show that the jury was sworn

to try the cause, and [because] this record fails to do so, the judgment must be reversed, and the cause remanded for a new trial." *Id*.

How could this be anything other than structural error? If the tribunal is not lawfully constituted, and its verdict is a nullity, what requirement could there be to show (additional) prejudice? Mr. Bainter was "convicted" by a tribunal not lawfully constituted to try him and render a verdict. *Id*. That must be structural, and those were the cases Mr. Bainter cited to support his argument.

Mr. Bainter also cited ***State v. Goucher***, 111 S.W.3d 915, 917 (Mo.App. S.D. 2003), for the proposition that the "deprivation of certain basic protections will necessarily render a trial fundamentally unfair, *i.e*., structural defects which defy analysis by harmless error standards." Again, this was Mr. Bainter's support of his argument that the fact that he did not receive the jury trial to which he was entitled was a structural error.

The complete failure to swear the jury has never been considered anything but a structural error; such a jury's purported verdict is a nullity under Missouri law, and this Court should reject the State's attempt to ignore a century of precedent and stability in the law. Mr. Bainter was denied his right to a jury trial, and this Court must therefore reverse his convictions and remand for a new trial.

III.

The State misunderstands that Mr. Bainter did not challenge the "restraint" element of felonious restraint, but only the "substantial risk of serious physical injury" element. The State did not show that the mere presence of guns led to more than impermissible speculation as to that element.

At trial, the State told the jury, "Counts 3, 5, 7, 9, 11, 13 and 15, those seven counts are felonious restraint counts. There is a count for every victim that was put into the meat cooler. . . . And again, the defendants restrained every one of those victims without their consent and put them into the meat cooler." (Tr. 1144). Now the State's theory is that every time one of the robbers told an IGA employee or customer where to go within the store, this constituted a separate offense. (Resp.Br. 60-61). By this accounting, there should have been dozens of counts of felonious restraint, rather than a mere single count for each victim. But the State should not be heard at this late date to change its entire theory of prosecution.

The State puts much effort into arguing that a restraint occurred—a substantial interference with the victims' liberty. (Resp.Br. 59-61). But that was not the basis of Mr. Bainter's challenge to his conviction on these counts. Rather, the challenge is based on the fact that the restraint did not expose the victims to a "substantial risk of serious physical injury." § 565.120.1.

All the State answers on that issue is that the robbers had guns, therefore there was a risk of serious physical injury, citing ***State v. Brigman***, 784 S.W.2d 217, 221

(Mo.App. W.D. 1989) ("Threat of injury from a weapon is sufficient to substantiate the charge"). (Resp.Br. 61). But the State both misunderstands Mr. Bainter's argument and contradicts its own argument.

Mr. Bainter did not argue that the use of a gun renders every robbery victim "restrained," though it is difficult to conceive a situation in which there is no substantial restraint of liberty. At any rate, his argument was rather that if the presence of a gun is sufficient to prove a substantial risk of serious physical injury, then every armed robbery would also constitute felonious restraint—because if every robbery victim is inherently restrained, at least briefly, the presence of the gun would, according to the State, establish the element of risk of injury. But there is no basis on which to believe that the legislature intended such a result.

The State contradicts itself because it first goes to great lengths to argue that the use of guns to tell the IGA victims to sit or lie on the ground, not to leave the store, to go to various areas and deliver money, and to go into the cooler, establishes the "restraint" element of the offenses. (Resp.Br. 59-61). But then it says that not all armed robberies involve a substantial interference with liberty. (Resp.Br. 61). These theories do not jibe. In any armed robbery, the victim is ordered to deliver up something of value, at the implied or actual point of a gun. The victim is not free to walk away or ignore the robber, hence his or her liberty has been interfered with. If the mere fact of the presence of a gun also adds, according to the State, a substantial risk of serious physical injury, all elements of felonious restraint are present.

The State simply ignores Mr. Bainter's argument that the case law—e.g., ***Brigman***—holding that the mere possibility of harm is sufficient, runs afoul of the prohibition set out in ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001), against supplying missing evidence, or giving the State the "benefit of unreasonable, speculative or forced inferences." Speculating as a method of proving elements of criminal offenses—such as that the presence of a weapon might have led to serious physical injury—was disapproved of by this Court in ***Whalen***, and the State offers no theory why it was more than mere speculation that the victims may have faced serious injury simply because the robbers had guns.

In ***Whalen***, this Court held that the potential presence of two other police officers when the defendant shot a third was not sufficient to show that he was aware of those other officers' presence. *Id*., at 185. So too, the presence of a gun, without firing it, does not establish a risk, but only a potential risk of injury. Perhaps the guns were not even loaded. No one knows. And no one knows what risk the victims faced from the guns. But they faced no risk from being put in the cooler.

There certainly was substantial interference with the seven victims' liberty. But the State did not prove that they faced a substantial risk of serious physical injury. This Court must therefore reverse Mr. Bainter's conviction for the seven counts of felonious restraint and each associated count of armed criminal action and discharge him as to those counts.

V.

The State's repetitive references to "they" or to "Davis and appellant," when the actions it describes were performed only by Davis, do not substitute for evidence that Mr. Bainter in any way "acted together" with Davis merely by being with him when Davis fled from the scene of the vehicle stop and endangered motorists on the highway. There was no such evidence.

The State still does not get it. Although there may have been a reasonable inference that Davis knew that he was being arrested when the officer pulled him over and ordered him to throw his keys out the window (Resp.Br. 80), there is no such inference as to Mr. Bainter. "They" were not stopped by the officer, and Mr. Bainter was not stopped. Only Davis, the driver, was stopped. Mr. Bainter could not have been put on notice that he was involved in the exchange between Davis and the officer, at least not until he got out of the truck and ran—and that was after Davis had already committed the charged offense of resisting arrest by driving the wrong way on I-70 and creating a hazard.

The continued use of the word "they," or continuing to say Davis "and" Mr. Bainter did this or that, does not prove that Mr. Bainter acted together with Davis. It is instead a presumption that just because Mr. Bainter was in the truck he therefore did everything that Davis did. Such a presumption is not constitutionally permissible. ***Sandstrom v. Montana***, 442 U.S. 510, 523 (1979) (a presumption in a jury instruction—that "[t]he law presumes that a person intends the ordinary consequences

of his voluntary acts"—if either conclusive or it shifts the burden of persuasion to defendant, deprives defendant of his constitutional right to have the State prove each element of an offense beyond a reasonable doubt; *citing* ***In re Winship***, 397 U.S. 358, 364 (1970)).

The State alleged that Mr. Bainter acted together with Davis—it did not allege that he aided or encouraged Davis (L.F. 104-05, 135). But it presented no evidence as to anything Mr. Bainter did to act with Davis, other than fail to get out of a speeding truck traveling the wrong way on an interstate highway. If he may be convicted on such evidence—simply because he did not prove that, all the way down the road he was demanding to be let out—then the State has unconstitutionally shifted the burden to the defendant.

Under § 575.150 and Instruction 23 (L.F. 135), the State had to prove that Mr. Bainter knew that he was being arrested, and that he fled in such a manner as to create a risk of serious injury to some person. But the only evidence—and the only argument—the State offers is of Davis's actions, not Mr. Bainter's. Every use of the phrase "Davis and appellant" in the State's brief would be made an accurate reflection of the facts as presented at trial if it were changed simply to "Davis," for that is all the evidence established.

So what evidence was there that Mr. Bainter knew that he was being arrested—for possessing stolen license plates or for any other offense? None. He knew that a police officer pulled over the vehicle in which he was a passenger. That establishes no more than a traffic stop. It does not mean that he knew that either man was being

arrested. Even adding in the factor that the officer drew his gun and ordered Davis to throw the keys out the window at most might make a person in Mr. Bainter's position suspect that Davis was being arrested. But, one, that does not mean that Mr. Bainter knew he was being arrested, and two, a mere suspicion is not knowledge. See, ***State v. Whalen***, 49 S.W.3d 181, 185 (Mo. banc 2001) (insufficient evidence that defendant knew two other officers were close behind the officer defendant shot where they were not in view; only speculation supported inference that defendant was aware of the presence of the other two officers).

Here, officer Schneider said only that he saw Davis look in his direction after the officer ordered him to throw out the keys (Tr. 522). In fact, he was only able to identify Mr. Bainter because he saw Mr. Bainter look at Davis, not at the officer (Tr. 530-31). Moreover, Schneider kept his gun down by his right leg, in the ready position; it was not out in view (Tr. 521). Therefore, there is nothing in the record to show that Mr. Bainter knew the officer was contemplating an arrest—of anyone.

And even if the record did not mandate that conclusion, there is even less of a record that Mr. Bainter did anything "together with" Davis to create a risk to any person. The State has offered no record citation that Mr. Bainter ever guided the truck. It offers no evidence that Mr. Bainter even made a joint decision with Davis to drive in the manner he did. Nor was there evidence that Mr. Bainter requested, directed, or even acquiesced in Davis's actions in endangering people on the road.

And the State's suggestion that Mr. Bainter could have just "gotten out of the truck" when Davis was pulled over (Resp.Br. 84), ignores reality. If Mr. Bainter had

known that the officer had drawn his gun in an attempt to make an arrest, he would likely have risked the officer opening fire if one man suddenly got out. Further, the State offers no reason that Mr. Bainter should have known Davis was going to drive off. So there was no reason for Mr. Bainter to get out—until it was too late to do so; there was no testimony that the truck ever came to a stop after Davis drove away from the officer—until he finally stopped along the highway.

The State almost unconsciously makes the leap from what Davis knew, and what Davis did, to what Mr. Bainter knew or did, or what "they" did. It does not show how, for example, it gets from "Davis looked over his right shoulder and then drove off," then led the officer on a chase, to Mr. Bainter "knew that Officer Schneider was trying to arrest him." (Resp.Br. 80). There simply was no evidence that gets the State from one point to the other.

The State's argument is nothing more than an attempt at sleight of hand—Davis suddenly changes to Davis and Mr. Bainter. It is an exercise in either confusion or misdirection. That is why ***State v. Chamberlin***, 872 S.W.2d 615 (Mo.App. W.D. 1994), has no application here. ***Chamberlin*** involved the issue whether there was evidence from which the jury could conclude that the driver was aware that the officer chasing him was making an arrest. *Id*., at 618. Mr. Bainter has never argued that Davis was not resisting arrest.

The State also misunderstands Mr. Bainter's argument about his knowledge concerning for what offense the officer may have been making an arrest. (Resp.Br. 82). The point is not that the officer must somehow communicate the name of the

offense before one can resist. Instead, the point is that, without some knowledge of the stolen plates, or that the officer intended to arrest either or both men for such an offense, Mr. Bainter could not know more than that the officer was making a traffic stop. And no passenger could ever know that he was resisting arrest if the driver fled from a traffic stop.

Another bit of misdirection is in the State's citation to ***State v. Biggs***, 170 S.W.3d 498, 504 (Mo.App. W.D. 2005), for the proposition that, "[t]he central tenet of accomplice liability is the notion that all who act together 'with a common intent and purpose' in committing a crime are equally guilty."[3] (Resp.Br. 83). Mr. Bainter does not quibble with that statement of law, but, unfortunately, the State goes on to discuss the "common intent and purpose" element of the central tenet, while ignoring the "act[ed] together" element. (Resp.Br. 83-85). And the reason is that there was no evidence to support the "acted together" element.

In summary, there was no evidence that Mr. Bainter knew he was being arrested, and no evidence of anything Mr. Bainter did to act together with Davis in driving off from the scene of the initial stop, or in driving the wrong way on the highway and thereby create a risk to any other person. The State failed to prove Mr. Bainter guilty of resisting arrest, and this Court must reverse his conviction under Count 18, resisting arrest, and order him discharged on that count.

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[3] Citing, ***State v. Copeland***, 928 S.W.2d 828, 847 (Mo. banc 1996).

CONCLUSION

For the reasons set forth in Point I, herein and in his opening brief, appellant Paul Bainter respectfully requests that this Court reverse his convictions and sentence and remand for a new trial without the evidence concerning the McDonald's Bar robbery. For the reasons set forth in Point II, herein and in his opening brief, Mr. Bainter respectfully requests that this Court reverse his convictions and sentence and remand for a new trial. For the reasons set forth in Point III, herein and in his opening brief, Mr. Bainter respectfully requests that this Court reverse his convictions and sentence on Counts 3, 5, 7, 9, 11, 13, and 15, felonious restraint, and Counts 4, 6, 8, 10, 12, 14, and 16, armed criminal action, and discharge him therefrom. For the reasons set forth in Point IV in his opening brief, Mr. Bainter respectfully requests that this Court reverse his convictions and sentence and remand for a new trial without admission of the evidence unlawfully seized from his person and possession. For the reasons set forth in Point V, herein and in his opening brief, Mr. Bainter respectfully requests that this Court reverse his conviction and sentence on Count 18, resisting arrest, and discharge him therefrom.[4]

[4] The relief requested under some Points in the Conclusion of Mr. Bainter's opening brief does not match the Points in the body of the brief; the relief requested above is correct.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,861 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan, updated in August, 2006. According to that program, these disks are virus-free.

On the _____ day of August, 2006, two true and correct copies of the foregoing reply brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to Lisa M. Kennedy, Assistant Attorney General, 221 W. High Street, Jefferson City, MO 65102.

_____
Kent Denzel